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In The

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

vs.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICI CURIAE* OF THE HISPANIC NATIONAL BAR ASSOCIATION AND THE HISPANIC ASSOCIATION OF COLLEGES AND UNIVERSITIES IN SUPPORT OF RESPONDENTS

GILBERT PAUL CARRASCO
WILLAMETTE UNIVERSITY
COLLEGE OF LAW
245 Winter Street SE
Salem, Oregon 97301
(503) 370-6432 – Telephone
(503) 370-6375 – Telefacsimile
Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICUS CURIAE* HISPANIC NATIONAL BAR ASSOCIATION*

The Hispanic National Bar Association (HNBA) is a non-profit, national association representing the interests of Hispanic American attorneys, judges, law professors, law graduates, law students, legal administrators, and legal assistants or paralegals in the United States and Puerto Rico. Its continuing mission: To improve the study, practice, and administration of justice for all Americans by ensuring the meaningful participation of Hispanic Americans in the legal profession. Founded in California in 1972 as La Raza National Lawyers Association, the HNBA has grown to represent thousands of Hispanic Americans in the legal profession across the country. National officers are elected by the membership at large, and Regional Presidents are elected by their regional members. The HNBA collaborates with State and local Hispanic Bar Associations in over 100 cities in the United States.

The primary objectives of the HNBA are to increase professional opportunities for Hispanics in the legal profession, and to address issues of concern to the national Hispanic community. Legal education and civil rights have been fundamental concerns of the HNBA from the beginning. Judicial appointments and political representation are also priorities of the HNBA.

The HNBA is a member of the National Hispanic Leadership Agenda (NHLA), a group comprised of representatives from 21 Hispanic national organizations, representing over 160,000 active Hispanic community leaders. The NHLA's task is to provide an agenda that will improve the Hispanic community.

The HNBA holds a seat in the American Bar Association House of Delegates. The HNBA has also formed and

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* No counsel for any party authored this brief in whole or in part. No person or entity other than the *amici curiae* or their members made a monetary contribution to the preparation or submission of this brief.

sponsors a law student division, which seeks to increase Hispanic student representation in law schools. This is a joint effort with all 183 ABA-accredited law schools, the American Association of Law Schools, and the Law School Admission Council. Through its related 501(c)(3) charitable organization, The Hispanic National Bar Foundation, Inc. (HNBF), thousands of dollars in scholarships have been awarded to deserving Hispanic law students, which has significantly contributed to the development of our nation's future leaders. As a result of these efforts, the HNBA has become an integral part of the American legal education system.

The HNBA, as a national organization of Hispanic attorneys, has a particular interest in issues regarding the role and effectiveness of Hispanic lawyers and the delivery of legal services to Hispanic communities. Indeed, few issues are as self-evidently within the HNBA's scope of concern as are those that are the central focus of *Grutter v. Bollinger,* 137 F.Supp.2d 821 (D.Mich. 2001), *reversed,* 288 F.3d 732 (6th Cir. 2002) (*en banc*).

The role of the HNBA is to provide professional services to those local and national members who seek assistance with their own professional advancement and on issues that affect the Hispanic community. Ultimately, the HNBA works diligently to bring about a better understanding and confidence in our legal system for the benefit of everyone.

INTEREST OF THE *AMICUS CURIAE* HISPANIC ASSOCIATION OF COLLEGES AND UNIVERSITIES

Since its inception in 1986, the Hispanic Association of Colleges and Universities (HACU) has championed the higher education success of the nation's youngest and largest ethnic population. The formal mission of HACU, a non-profit, tax-exempt 501(c)(3) organization, is to promote the development of member colleges and universities; improve access to and the quality of postsecondary educational opportunities for Hispanic students; and to meet the needs of business, industry and government

through the development and sharing of resources, information, and expertise.

HACU's 340 member and partner colleges and universities collectively serve more than two-thirds of all Hispanic higher education students in the United States. The reach of HACU and its member institutions also extends to pre-collegiate, workforce development, and lifelong education initiatives. HACU member and partner institutions are located in 23 States, Puerto Rico, eight Latin American countries, and Spain.

HACU is the only nationally organized voice for Hispanic-Serving Institutions, or HSIs, which have full-time student enrollments that are at least 25 percent Hispanic. HACU has an inherent interest in issues regarding the role and effectiveness of Hispanic students and their access to higher education, including post-graduate education.

HACU well knows the role of diversity as one of the most important means to strengthen and enrich higher education for all students in the United States. This is not an issue that should be viewed along minority versus non-minority lines. All Americans benefit by the promise of equal opportunity to achieve higher education success in diverse learning communities; all Americans would suffer by denying the importance of diversity in the most culturally and racially diverse nation of the world. A decision against college admissions policies in place since the landmark Supreme Court *Regents of the University of California v. Bakke*, 438 U.S. 265, decision in 1978 would create an immediate crisis for Hispanics, who already suffer the lowest college entrance and completion rates among all major U.S. population groups.

SUMMARY OF ARGUMENT

Legal education is the quintessential conduit to the practice of law. *Amici* Hispanic National Bar Association and Hispanic Association of Colleges and Universities remain steadfast in their commitment to law school affirmative action programs aimed at qualified applicants

of color. Such programs are critical to diversity in the legal profession and, therefore, constitute the necessary means to achieving this compelling State interest. The words of an esteemed Texan who understood the importance of affirmative action apply today as they did a generation ago when they were uttered:

> You do not take a person, who for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race, and then say, "You are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough just to open the gates to opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.

President Lyndon B. Johnson, To Fulfill These Rights, Address at the Howard University Commencement Ceremony, June 4, 1965.

Amici Curiae urge this Court to consider the intent of the Framers of the Fourteenth Amendment. The same Members of Congress who proposed and ratified the Amendment enacted race-specific legislation. Their objective was to achieve equalization for the newly freed slaves. The process of equalization remains to be completed.

This Court's decision in *Regents of the University of California v. Bakke* commanded a majority on the question whether race could be used as a factor in a graduate admissions process. It should be reaffirmed here. The context of education is of critical importance to the Hispanic community. Here, as much as in any other setting, the fair consideration of race and ethnicity as factors among many in the admissions process, is essential to the process of equalization that the Constitution contemplates. Moreover, diversity in the educational environment is a compelling State interest.

Finally, diversity in law school admissions directly correlates with diversity in the legal profession. There is a continuing and growing need for Latino lawyers. Affirmative action not only advances the interests of those in the Hispanic community who do not have access to representation, it also assists the legal community at large in reducing the perception and, in many cases, the reality that there is bias in our system of justice. Elimination of affirmative action would have the demonstrable and devastating effect of reducing the number of people of color entering the legal profession.

ARGUMENT

I. THE ORIGINAL LEGISLATIVE INTENT OF THE FRAMERS OF THE FOURTEENTH AMENDMENT ESTABLISHES THAT RESPONDENTS' USE OF RACE IS CONSISTENT WITH THE PROPER INTERPRETATION OF "THE EQUAL PROTECTION OF THE LAWS"

The original purpose of the Equal Protection Clause of the Fourteenth Amendment was to guarantee a mode of redress for discrimination against African-Americans "[a]s a class, or on account of their race." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873). Indeed, the same Congress that proposed the Fourteenth Amendment also enacted race-conscious legislation. In fact, "these statutes expressly refer to color in the allotment of federal benefits." Jed Rubenfeld, *Affirmative Action*, 107 Yale L. J. 427, 431 (1997). *E.g.*, Southern Homestead Act of 1866, ch. 31, 14 Stat. 66, 39th Cong., 1st Sess. (June 21, 1866) (priority to Freedmen over whites for land grants in the States of Alabama, Mississippi, Louisiana, Arkansas, and Florida); Res. No. 46, 14 Stat. 357, 39th Cong., 1st Sess. (July 15, 1866) (bounties to "colored servicemen and their heirs"); Freedmen's Bureau Act of 1866, ch. 200, 14 Stat. 173, 39th Cong., 1st Sess. (July 16, 1866) (continuing the Freedmen's Bureau); Public School Funding for District of Columbia, ch. 217, 14 Stat. 216, 39th Cong., 1st Sess. (July 23, 1866) (proportionate funding for public schools and

education of "colored children"); Maximum Fee Schedules Res. No. 86, 14 Stat. 367, 39th Cong., 1st Sess. (July 26, 1866) ("maximum fee schedule for agents collecting bounties on behalf of colored servicemen"); Public Lands for Public Schools, ch. 308, 14 Stat. 343, 39th Cong., 1st Sess. (July 28, 1866) (donating certain lots in the city of Washington for schools for "colored children"); Civil Appropriations Act, ch. 296, 14 Stat. 310, 39th Cong., 1st Sess. (July 28, 1866) (appropriating money for "the relief of destitute colored women and children"); Res. No. 4, 15 Stat. 20, 40th Cong., 1st Sess. (March 16, 1867) (providing money to destitute "colored" persons in Washington, D.C.); renewal of Freedmen's Bureau Act, ch. 135, 15 Stat. 83, 40th Cong., 2d Sess. (July 6, 1868, three days before the ratification of the Fourteenth Amendment); ch. 245, 15 Stat. 193, 40th Cong., 2d Sess. (July 25, 1868) (continuing the education department and collection/payment of servicemen's wages); *see also* Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507, 38th Cong., 2d Sess. (March 3, 1865); Eric Foner and John A. Garraty eds., *Freedmen's Bureau* in *The Reader's Companion to American History* 420 (1991); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 784-85 (1985) (hereinafter *Affirmative Action, Legislative History of Fourteenth Amendment*) ("No member of Congress hinted at any inconsistency between the Fourteenth Amendment and the Freedmen's Bureau Act"); *see generally* Roy L. Brooks, Gilbert Paul Carrasco, & Michael Selmi, *Civil Rights Litigation: Cases and Perspectives* 1216-1217 (2d ed. 2000).

Since then, the Equal Protection Clause has been construed to justify the use of race in a discriminatory fashion, through this Court's adoption of the "separate but equal" doctrine in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Even though this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), struck down that interpretation and began the long overdue era of desegregation in public schools, unfortunately we have seen a return to segregation in many, if not most, of this country's urban areas. *Milliken v. Bradley* (*I*), 418 U.S. 717 (1974); *Milliken v. Bradley* (*II*), 433 U.S. 267 (1977) (recognizing the futility of desegregating the schools of Detroit); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976) (denying a remedy for resegregation unless new evidence of intent to discriminate could be adduced). The single vote in *Milliken I* that made a majority in this Court's decision could have made a tremendous difference in the course this nation has taken in the desegregation of our elementary and secondary schools. Now, it may be but a single vote in the case at bar that will make the difference and decide whether we will have the same degree of segregation in our schools of higher education.

Petitioner's argument would render impermissible any consideration of race in the admissions process at the University of Michigan Law School, and in public law schools throughout this country. A construction of the Equal Protection Clause that forbids consideration of race/ethnicity as one factor among many in the context of graduate school admissions is in conflict with this Court's precedent. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (opinion of the Court *per* Powell, J.); *id.* at 328 (opinion of Brennan, J., joined by White, Marshall, and Blackman, JJ., concurring in the judgment in part, dissenting in part and joining in Part V-C of Justice Powell's opinion.) Such a construction would ignore the history and validity of race-sensitive government action, and would discount the importance of achieving diversity in institutions of higher learning. If the Equal Protection Clause was forged as a tool to redress "prejudice against discrete and insular minorities," how can justice possibly be served if that tool is now turned into a weapon to be used against the very people it was designed to aid? *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

A. The Framers of the Fourteenth Amendment Enacted Race-Specific Legislation.

There is a long and settled tradition of referring to the words and contemporaneous legislative action of the

Framers to determine the appropriate construction of the Constitution. As Judge Learned Hand said, "[T]he meaning of the various provisions of the Constitution is to be gathered from the words they contain, read in the historical setting in which they were uttered." Learned Hand, *The Bill of Rights* 3 (1958). Even when the intent of the Framers is unclear, "we must employ both history and reason in our analysis." *Wallace v. Jaffree,* 472 U.S. 38, 81 (1985) (O'Connor, J., concurring in the judgment).

Although it is sometimes difficult to ascertain the intent of the Framers, when it can be discerned it should be considered in the process of constitutional exegesis. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 40 (1997) (the "whole purpose" of the entire Constitution insofar as it confers or recognizes rights "is to prevent change – to embed certain rights in such a manner that future generations cannot readily take them away"). That the original intent of the Members of Congress who framed the Fourteenth Amendment was to aid discrete minorities ineluctably leads to the conclusion that race-conscious legislation is constitutional. It was the 39th Congress that proposed the Fourteenth Amendment, which was ratified by the States in 1868 during the 40th Congress.

"[T]he legislative history of the Fourteenth Amendment is not only relevant to but dispositive of the legal dispute over the constitutional standards applicable to race-conscious affirmative action plans." *Affirmative Action, Legislative History of Fourteenth Amendment* at 754. The 39th Congress proposed and/or enacted several measures concurrently with the Fourteenth Amendment that conferred benefits that specifically used race as a factor of eligibility. As Chief Justice Taft observed, "This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the Founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions. . . . " *Hampton & Co. v. United States*, 276 U.S. 394, 412 (1928); *accord*, *Humphrey's Executor v. United States*, 295 U.S. 602, 630-631 (1935); *Myers v. United States*, 272 U.S. 52, 109-136 (1926) (extensively recounting the views of the Framers, both in adopting the Constitution and in enacting legislation in the First Congress); *cf. Clinton v. City of New York*, 524 U.S. 417, 466-469 (1998) (Scalia, J., joined by O'Connor and Breyer, JJ., concurring in part and dissenting in part).

In the Freedmen's Bureau Bill, Congressman Thomas Eliot proposed statutory benefits that included race as a basis for eligibility. The proposal called for the creation of an agency providing special assistance and protection for blacks, "whereby or wherein any inequality of civil rights . . . is recognized, authorized, established or maintained by reason or in consequence of any distinctions or differences of color, race or descent . . . ". Alfred Avins, *The Reconstruction Amendment's Debates* 99 (Virginia Commission on Constitutional Government, 1967) (hereinafter *Reconstruction Amendment's Debates*). Additionally,

> Congressman Phelps urged . . . [t]he very discrimination it makes between destitute and suffering Negroes and suffering white paupers, proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection.

Affirmative Action, Legislative History of Fourteenth Amendment at 768. General Howard, Commissioner of the Freedmen's Bureau, reported that the educational components of the Act were the most important. The Act extended educational opportunities to the freedmen, to the exclusion of whites. "In most years more than two-thirds of all funds expended by the Bureau were used for the education of freedmen. [T]he Freedmen's Bureau educated approximately 100,000 students, all of them black." *Id.* at 780-781.

During the debates on the Freedmen's Bureau bills, Senator Lyman Trumbull of Illinois proposed the Civil Rights Act of 1866. This legislation previewed the equal protection language in the Fourteenth Amendment, which

provided citizenship to all persons of African descent born in the United States, and sought to eliminate discrimination based on race. President Johnson vetoed the Act in part because it provided blacks with what Johnson regarded as unprecedented and unwarranted special treatment. *Id* at 771. It was nevertheless enacted by Congress when "[t]he House voted 104 to 33 to override the veto, and the Senate voted the bill into law by a margin of 33 to 12." *Id*. at 774.

After the Freedmen's Bureau bill was enacted into law as the Freedmen's Bureau Act of 1866, Congress adopted two additional statutes that authorized the Freedmen's Bureau to offer aid to freedmen or destitute colored people. "Congressman Bingham, the author of the Fourteenth Amendment, saw no objection to the general racial limitation in the Freedmen's Bureau Act." *Id.* at 777. Nor did Bingham find the equal protection language in the Fourteenth Amendment inconsistent with the racial limitations in the Freedmen's Bureau laws. In fact, "Congress, fully aware of the racial limitations, . . . cannot have intended the amendment to forbid the adoption of such remedies by itself or the states [T]he supporters of the Act and the amendment regarded them as consistent and complementary . . . ". Since the drafters of both the Civil Rights Act of 1866 and the Fourteenth Amendment supported the Freedmen's Bureau legislation, it follows that the equal protection language of the Fourteenth Amendment was not intended to eliminate the racial restrictions within the Freedmen's Acts. If the Fourteenth Amendment had eliminated the racial limitations, it would have eliminated the Bureau as well. Moreover, some of the race-specific functions of the Bureau were extended by statute after the adoption of the Fourteenth Amendment. *E.g.*, Freedmen's Bureau Act, ch. 245, 15 Stat. 193, 40th Cong., 2d Sess. (July 25, 1868). Therefore, the legislative intent of the 39th and 40th Congresses, whose Members were the Framers of the Fourteenth Amendment, was to recognize race as a legitimate and constitutionally acceptable factor in various Reconstruction legislation.

B. The Need for Affirmative Action Persists.

The generation contemplating law school or higher education today has enjoyed freedom from slavery and involuntary servitude, but the process of equalization contemplated by the Fourteenth Amendment continues. Disparities between whites and non-whites are found at virtually every level of society. Problems in educational systems limit minorities long before graduate school. Miguel A. Mendez & Leo P. Martinez, *Toward a Statistical Profile of Latina/os in the Legal Profession,* 13 Berkeley La Raza L. J. 59, 84 (2002) (hereinafter *Toward a Statistical Profile*). These gaps lead to inequities in law school admissions and persist in the form of under-representation in the legal profession. *Id.* at 59.

It is of particular importance for the Hispanic community to have multilingual representation. *See* Deborah Weisman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. Rev. 1905, 1906 (2000) (hereinafter *Between Principles and Practice*). According to the Census Bureau, 28 million residents speak Spanish. Nearly half of those do not speak English. *See generally* www.census.gov. The status of many Hispanics as new citizens and non-native speakers poses challenges to the protection of their constitutional rights. These non-native speakers encounter due process and fundamental rights violations as a result of language barriers. *Between Principles and Practice* at 1905; *cf. Lau v. Nichols*, 414 U.S. 563 (1974). In 1990, the legal profession was three percent Hispanic. *Toward a Statistical Profile* at 65. According to studies, the rate of growth in the number of Hispanic attorneys was so low that, even with affirmative action programs, parity in the legal profession will not occur until 2044 if the percentage of Hispanics remains at the 1990 level. *Id.* at 71. If, as predicted by the U.S. Census Bureau, the percentage of Hispanics in the population increases to 24.5% by 2050, it would take 138 years from 1990 for Hispanics to comprise one of every four members of the legal profession. *Id.*

While race and gender neutrality remain an ideal goal, the process of equalization has not been completed. See statistical analysis, *infra*. Parity in the legal profession is still only a distant hope for most people of color, especially Hispanics. Any construction of the Fourteenth Amendment that fails to account for unequal educational and employment opportunities contradicts the spirit and purpose of the Amendment. As this Court early recognized, "[T]he spirit of an instrument, especially of a Constitution, is to be respected not less than its letter." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122, 202 (1819).

The 39th Congress recognized race-conscious legislation as consistent with the intent of the Fourteenth Amendment. Society has made it clear that people of color continue to need such legislation to achieve equality under the law. We ask that this Court make it clear that race, as a factor among many, is permissible in the law school admissions process.

II. THIS COURT'S DECISION IN *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE*, WHICH FOUND THAT THE USE OF RACE IN A UNIVERSITY ADMISSIONS PROCESS IS CONSTITUTIONALLY PERMISSIBLE, WAS CORRECTLY APPLIED BY THE COURT OF APPEALS

The Court of Appeals correctly found Justice Powell's opinion in *Bakke* as support for the Michigan admissions process. Part V-C of Justice Powell's opinion in *Bakke* was joined by four other Justices and comprised the holding of the case: "[T]he State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Bakke*, 438 U.S. at 320 (opinion of the Court *per* Powell, J.); *id.* at 328 (opinion of Brennan, J., joined by White, Marshall and Blackmun, JJ., concurring in the judgment in part, dissenting in part, and joining in Part V-C of Justice Powell's opinion). While the lack of a majority in much of Justice Powell's opinion has

caused some confusion, that five Justices agreed to the two sentences that comprised Part V-C of his opinion is incontrovertible. This Court has not overruled *Bakke*, nor disavowed its central holding.

The majority opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* counseled that this Court should be circumspect when it considers overruling a case, particularly one that involves an "intensely divisive controversy" and where a whole generation had relied on the precedent and structured its conduct accordingly. *Casey*, 505 U.S. 833, 866-67 (1992) (Part III of opinion of O'Connor, Kennedy, and Souter, JJ., for the Court). By applying this Court's holding in Part V-C of *Bakke* and by finding that the University of Michigan Law School's admission policy was narrowly tailored to serve its compelling interest in achieving a diverse student body, the Sixth Circuit Court of Appeals acted well within the permissible scope of its appellate jurisdiction. *See* 28 U.S.C.A. § 1291 (West 1993).

The use of race/ethnicity, as one factor among many in the admissions process, continues to be constitutionally permissible and is not undermined by this Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Strict scrutiny is not "fatal in fact," and the analysis of race-based government decisions in *Adarand* makes it clear that the consideration of race is a permissible factor in some circumstances. *Adarand*, 515 U.S. at 237 (Part III-D of opinion of O'Connor, J., announcing the judgment of the Court, joined here by a majority). State action that considers race/ethnicity is surely permissible where such factor is not dispositive but, rather, is but one factor among many in a law school admissions process. The race/ethnicity of qualified applicants is relevant and the Respondents properly considered such factors in their admissions process.

A. This Court's Analysis of the Constitutionality of Race-Conscious Programs in Other Contexts is Consistent with *Bakke's* Upholding of the Consideration of Race in the Educational Context.

The import of *Bakke* for affirmative action in higher education is unchanged by this Court's decisions in subsequent cases. This Court's judgments in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Peña* were in contexts other than higher education. With no specific discussion in either case of diversity in an educational setting or of race-conscious admissions programs, it is clear that the U.S. District Court misinterpreted *Croson* and *Adarand* to conclude that *Bakke* is no longer controlling.

Furthermore, the context of education has enjoyed a special place in this Court's interpretation of the Equal Protection Clause. In *Brown v. Board of Education*, continuing to *Bakke* and *Plyler v. Doe*, this Court has recognized the key role education plays, and it has created standards for this environment that other contexts do not enjoy. *Brown*, 347 U.S. at 493 (describing education as the foundation of good citizenship); *Bakke*, 438 U.S. at 318 (upholding use of race in admissions decisions); *Plyler*, 457 U.S. 202 (1982) (striking down Texas' denial of education to undocumented students notwithstanding that education is not a fundamental right). *See also United States v. Fordice*, 505 U.S. 717 (1992) (requiring more than objectively neutral admissions criteria to satisfy the affirmative duty to desegregate a system of higher education); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding discriminatory system of higher education at University of Texas Law School violative of Equal Protection Clause).

Two important employment decisions also support the use of race-conscious decision making, even in non-remedial contexts. In *United Steelworkers v. Weber*, 443 U.S. 193 (1979), this Court rejected the idea that an affirmative action program may only be adopted to redress judicial or administrative findings of an employer's past

discrimination. *Weber*, 443 U.S. at 212. Instead, an employer must show a "conspicuous . . . imbalance in traditionally segregated job categories." *Id.* at 209. *Weber* supports employers' decisions to engage in voluntary affirmative action to eliminate under-representation in the workplace. And in *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616, 638 (1987), this Court upheld an employer's affirmative action plan partly by analogizing the consideration of race in *Bakke* to the consideration of gender for women who are traditionally under-represented in certain professions. If an employer finds a manifest imbalance in the workforce, affirmative action may be used to equalize the situation even if the employer's goal is to diversify the workforce. *See also Farmer v. Univ. and Community College System of Nev.*, 930 P.2d 730 (Nev. 1997), *cert. denied*, 583 U.S. 1004 (1998) (upholding a diversity-based hiring plan for university faculty); *Wittmer v. Peters*, 87 F.3d 916, 920-21 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997) (upholding, *per* an opinion by Judge Posner, race-conscious hiring).

B. Achieving Diversity in Systems of Higher Education is a Compelling State Interest that is Consistent with Equal Protection Principles.

This Court's judgment in *Bakke* suggests that race and ethnicity are appropriate factors to consider in the context of higher education admissions processes if other factors are considered as well (*e.g.*, grades, test scores, geographical origin, relationships to alumni, socio-economic status, caliber of undergraduate institution). Justice Powell there observed that affirmative action is constitutional because all students enjoy the educational benefits of increased diversity. *Bakke*, 438 U.S. at 323. Under his strict scrutiny analysis, the promotion of educational diversity is a compelling interest because "[t]he atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely

believed to be promoted by a diverse student body." *Id.* at 312.

"If a law school is homogenous, evidence suggests it's not just minority students who lose out. In a 1999 Harvard Civil Rights Project survey, 90 percent of Harvard and University of Michigan law students said diversity had a positive impact on their education." Seth Stern, *Law Schools Renew a Drive for Diversity,* Christian Science Monitor, Dec. 5, 2000. Other respected studies have reached the same conclusion with respect to higher education generally. *Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms*, American Council on Education and American Association of University Professors (2000). Nothing contained in Justice Powell's opinion in *Bakke* regarding the need for diversity in education is any less pertinent today, nor has this Court removed this most legitimate rationale from consideration in the educational context.

The Petitioner misinterprets this Court's precedents and wrongly asserts that diversity is not a compelling interest. This conclusion is, in fact, belied by a number of this Court's holdings. Before this Court considered *Bakke*, it had decided *North Carolina State Bd. of Educ. v. Swann*, which supported a school board's decision to enhance racial balance, and found that objective to be worthwhile, apart from any constitutional obligations. 402 U.S. 43, 45 (1971).

In *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), this Court made a strong statement as to the value of diversity and linked the promotion of broadcast diversity with the classroom diversity that Justice Powell had extolled in *Bakke*. The majority of this Court in *Metro Broadcasting* stated, "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for . . . minority ownership policies." *Metro Broadcasting*, 497 U.S. at 567, *overruled on other grounds*, *Adarand*, 515 U.S. 200. Although this Court overruled *Metro Broadcasting* in *Adarand* as to the level of

required scrutiny, the diversity rationale was left undisturbed.

The importance of diversity in higher education was also recognized by Justice O'Connor in her concurrence in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986). She found that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." (O'Connor, J., concurring in part and concurring in the judgment). Also in *Wygant*, Justice Stevens evoked the image of the "melting pot" and emphasized the importance for school children of experiencing diversity in the classroom as an element of a shared sense of humanity. *Id.* at 315 (Stevens, J., dissenting).

III. AFFIRMATIVE ACTION IN LAW SCHOOL ADMISSIONS IS CRITICAL TO THE ATTAINMENT OF DIVERSITY IN THE LEGAL PROFESSION

The ideal of American democracy – equal justice under law –ultimately must rest on public confidence that the system of justice is fair and even-handed in its treatment of all people regardless of their status or condition. Thus, it is essential that all of the people of our nation be able to sustain an abiding trust in the fairness of the rule of law. Otherwise, they may not be willing to obey the law. As we all know, today that trust has been severely tested. The poor, the underprivileged, and various other groups who remain outside the mainstream of our country, do not have full confidence that the law treats all persons fairly and with respect. We can help allay this mistrust by making sure that the future lawyers, judges, and law teachers of this country are more representative than they now are of the nation as a whole. The need to diversify the legal profession is not a vague liberal ideal: it is an essential component of the administration of

justice. The legal profession must not be the preserve of only one segment of our society. Instead, we must confront the reality that if we are to remain a government under law in a multicultural society, the concept of justice must be one that is shared by all our citizens.

Unless law schools – the gateway to the profession – are able to maintain diversity by providing broad access to legal education, these goals will be unattainable.

> – – Conclusion, Report of the Diversity Committee for the Section of Legal Education and Admissions to the Bar, American Bar Association (1998) (Dean Herma Hill Kay, University of California, Boalt Hall, Chair)

The under-representation of minorities in the legal profession creates an increasingly critical societal problem. The disparity denies opportunities to qualified people of color, depletes the corridors of power and influence of racial and ethnic minorities, deprives people of color of legal representation, and begets racial and ethnic bias in the legal system. The elimination of this bias and increased representation among leaders in our society and for underserved groups are compelling State interests, and affirmative action programs at law schools are essential to the accomplishment of these vital objectives.

Directors of Admissions, utilizing race/ethnicity as one of many factors in admission decisions, use affirmative action programs to increase the diversity of law schools. The Petitioner's argument precludes the use of race/ethnicity as one factor among many in law school admission decisions. A color-blind admissions process causes a substantial reduction in the number of qualified law students of color and does not merely shift so-called less qualified students of color to less selective schools. Such a result is unacceptable lest we return to a policy of separate but equal. Color-blind admissions would exclude a substantial number of qualified minorities from admission to any law school.

Fewer attorneys of color translates to fewer opportunities to fulfill this nation's need for multicultural perspective in an increasingly global milieu, to less representation for underserved groups, and to the perpetuation of a legal system already suspect in the eyes of persons of color because of known racial and ethnic bias. This Court should affirm the decision of the Sixth Circuit Court of Appeals because diversity in the legal profession is an additional compelling State interest, justifying race-sensitive admission decisions because it will lead to reduction of racial bias within the legal system and promote equal access to it.

Even though the majority of law schools favor using race as one of many factors in determining admissions, there remains a continuing lack of diversity in the nation's law schools. Although Hispanics represent 12.5% of the nation's population, U.S. Census Bureau, *Facts for Features* (Sept. 3, 2002), available at www.census.gov., only 5.5% of the graduating Class of 2000 was Hispanic, as compared with 80.7% non-minority graduates. *Minority Databook*, Table VIII-1, Racial/Ethnic Representation of 2000 Graduates Law School Admission Council (2002).

It is essential that educational opportunities facilitate the creation of qualified future leaders that reflect the diverse society that they will one day represent. The progress made in diversifying the nation's most selective educational institutions must be maintained if its leaders are to be effective participants in today's global economy.

A. People of Color Are Grossly Underrepresented in the Legal Profession.

The legal profession has never reflected the diversity of American society. In 1990, people of color comprised 19.8% of the U.S. population. In 2000, people of color comprised 24.8% of all Americans. Frank Hobbs and Nicole Stoops, *Demographic Trends in the 20th Century*, U.S. Census Bureau, Census 2000 Special Reports, Series CENSR-4, at 77 (hereinafter *Demographic Trends*). The U.S. population is "projected to be nearly one-third minority by the year 2010, and almost 60 percent 'minority' by

2050." *Miles to Go 2000: Progress of Minorities in the Legal Profession*, American Bar Association Commission on Opportunities for Minorities in the Profession at x (2000) (hereinafter *Miles to Go*). Specifically, the Hispanic population grew by 3.5% between 1990 and 2000, more than doubling since 1980. *Demographic Trends*, at 79. While African-Americans and Hispanics made up 12.5% of all professionals in the U.S. workforce in 1998, they comprised only 7% of the legal profession. *Id.* at 1. From 1990 to 1994, African-American and Hispanic representation in the legal profession remained constant. The 1990 census showed African-American and Hispanic attorney representation in the profession was a mere 3.36% and 2.49%, respectively. In 1998, African-Americans still represented only 4% of the profession, while Hispanic representation remained constant at 3%. Total minority representation, including Asian-Americans and Native Americans is about 10%. *Miles to Go* at 1-2. This type of statistical disparity was outcome determinative in *Mississippi University for Women v. Hogan*, 454 U.S. 962 (1981). In *Hogan*, Justice O'Connor writing for this Court, found the under-representation of men in nursing to be significant. Equally significant is the under-representation of minorities, especially Hispanics, in the legal profession.

There has been an increase in law students of color since the mid-1970s, which fueled the increase in the number of attorneys of color between 1980 and 1990. In 1980, people of color comprised roughly 5% of the legal profession. By 1998, that percentage reached 10%. *Miles to Go* at 1. This increase directly correlates to an increase in the number of minority law students. Since the 1970s, the number of law students of color gradually increased until the late 1990s. The 1976 entering class consisted of 9,503 law students of color (8.4% of the class). The 1999-2000 class totaled 25,253 students of color (20.2% of the class). *Id.* at 3. The number of qualified people of color entering the legal profession increased substantially as a direct result of increased minority enrollment. By 1998, minorities comprised 13% of associates in the 250 largest law firms (6.1% Asians, 4% Blacks, and 2.8% Hispanics).

Michael D. Goldhaber, *Minorities Surge at Big Law Firms*, National Law Journal, December 14, 1998 at A1.

Affirmative action has had the desired effect: the encouragement of qualified students of color applying to law school in greater numbers, and the fostering of their development and leadership in the community at large. Indeed, the University of Texas Law School, notwithstanding its checkered past, *Sweatt v. Painter*, 339 U.S. 629 (1950), has produced more than 650 African-American and 1,300 Mexican-American lawyers, including former Secretary of Energy Federico Peña and Dallas Mayor Ron Kirk, both of whom had successful careers in law practice. Charles R. Lawrence III, *Race and Affirmative Action: A Critical Race Perspective, in* The Politics of Law (David Kairys, ed.) (3d ed. 1998) at 313.

Barriers within the legal profession impede qualified people of color, especially women of color, from progress within certain areas of the profession. In 1998, Hispanics comprised 2.8% of associates in the largest 250 firms, and only 0.9% of partners. *Miles to Go* at 8.

Minorities enter private practice less frequently than do non-minorities, a differential of 7.3% for the Class of 2000. Minority graduates are more likely to go into public service and public interest organizations, a differential of 1.3% in the Class of 2000. *Employment Comparisons and Trends for Men and Women, Minorities and Non-Minorities*, The NALP Foundation, available at www.nalp.org/nalpresearch (April 2002). This phenomenon translates to additional service by minority attorneys in communities of color.

The judiciary notably lacks Hispanic representation, although federal courts have relatively more Hispanic representation than State courts. However, both systems lag substantially behind the percentage of Hispanics in the general population. *Miles to Go* at 5; *see also* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. Rev.

95 (1997) (hereinafter *Judging the Judges*). Federal government lawyers constitute the most diverse group within the profession. In 2000, 16.5% of federal "general attorneys" (excluding administrative law judges and patent attorneys) were people of color. *U.S. Office of Personnel Management*, Demographic Profile of the Federal Workforce (2000). Of that 16.5%, Hispanics make up nearly 25% of the total minority representation. However, the under-representation of minorities in the profession continues to contribute to the perception of racial and ethnic bias and exacerbates actual bias.

B. Diversity in the Legal Profession Would Reduce Racial and Ethnic Bias.

Statutes, rules, policies, procedures, practices, events, conduct, and other factors, operating alone or together, that have a disproportionate impact upon one or more minorities, measure racial and ethnic bias in the justice system. *Achieving Justice in a Diverse America*, Report of the American Bar Association Task Force on Minorities and the Justice System, at 2 (1992) (reviewing bias reports from New Jersey, Michigan, Washington, New York, Florida, Washington, D.C., Hawaii, Arizona, Massachusetts, Iowa, and Los Angeles) (hereinafter *ABA Report*). Enhanced diversity in the legal profession will reduce racial and ethnic bias by promoting equal access to justice and real racial and ethnic equity.

Judges have the greatest obligation of impartiality. The federal and State judiciary comprises the institution that upholds the constitutional mandate of equality. U.S. CONST. Amend. V and XIV, § 1. Structural impartiality is furthered when the judiciary consists of judges from diverse backgrounds and perspectives. *See Judging the Judges*. Hispanics represent nearly 40% of minority Administrative Law Judges, 31% of minority federal judges, and 36.6% of all minority judges. However, in 1997 the total minority representation among all judges was

only 6%, or 3,610 judges. *Miles to Go* at 20. More distressing is that this number is not growing, because confirmation of minority federal judges has stalled.

> In 1999, the Senate confirmed only 40 percent of minority judicial nominees (8 out of 20), compared to 51 percent of whites, and adjourned leaving 58 vacancies on the federal bench. . . . Ninth Circuit nominee Richard Paez waited four years (an all time record) before being confirmed by the Senate in March 2000.

Id. at ix.

Diversity in legal education can play an important role in beginning to dispel racial and ethnic stereotypes that, unfortunately, persist in many dimensions of the legal profession. Bias, or even the perception of bias, in our courts shames the Constitution.

Within the civil justice system, language, information and cultural barriers conspire to deny equal access to justice. *ABA Report* at 19, A31-32. Moreover, inner city court facilities serving minorities are reportedly often poorly maintained and substantially inferior in a variety of ways. *Id.* at 20, A32-33. The "assembly line" justice given minority disputes in these courts lends credence to perceived racial and ethnic bias in the courts. *Id.*

Perceptions differ, though, even among attorneys, as a 1998 survey commissioned by the American Bar Association and the National Bar Association of over 1000 lawyers demonstrates. Over half of the black lawyers surveyed (52.4%) believed that there is "very much" bias that currently exists in the justice system, compared to only 6.5% of the white lawyers surveyed. Terry Carter, *Divided Justice*, ABA Journal, February 1999 at 42. Practicing attorneys in New York report judges making such comments as "there's another nigger in the woodpile" or "not having a Chinaman's chance" or calling minority women with children "rabbits." *Report of the New York State Judicial Commission on Minorities*, 19 Fordham Urb. L. J. 181, at 203-204 (1992). In a survey conducted for the American Bar Association in May 1998, only 39% of the

respondents believed that the courts treat all racial and ethnic groups alike. James Podgers, *Message Bearers Wanted: Judiciary Needs to Expand Effort to Explain and Bolster Public Perception of Justice System*, ABA Journal, April 1999 at 89.

It is difficult enough for people of color to gain access to the courts, without the additional burden of overt or even subtle racism. Because the Constitution does not guarantee assistance of counsel in most civil cases, the problem of effective, competent and affordable legal representation looms even larger for people of color in non-criminal disputes.

Diversity in the profession would counter actual and perceived racial and ethnic bias and increase the number of attorneys willing to represent underprivileged individuals and groups. *See* Lewis A. Kornhauser and Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. Rev. 829, 922-23, 938-39 (1995). Diversity in the profession is a compelling State interest insofar as it relates to providing access to justice for people of color. *Bakke*, 438 U.S. 265 (opinion of Powell, J., announcing the judgment of the Court and stating that, in some situations, a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification); M. Komaromy, et al., *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 New England J. Med. 1305 (1996). Similarly, it is also essential to provide critically needed legal representation to people of color.

There is overwhelming documentation of the need for improved legal services for people of color. *See ABA Report*. Minority attorneys, like doctors, have a higher rate of serving communities of color than white attorneys. Hispanic graduates are 1.4 times as likely to enter government work and 2.2 times as likely to practice public interest law. *Miles to Go* at 5. After law school graduation, whites have a much higher rate of entering private

practice, while graduating minorities enter business, government, and the public interest bar at a rate higher than whites. Non-whites are 7.5 percent less likely than whites to enter private practice, while the rate of non-whites practicing in the public interest considerably exceeds the rate of whites. *Id.* at 3-5.

Attorneys of color will often possess an enhanced understanding of the culture and, in some cases, the language spoken in such communities. This is a critical point for Hispanic communities throughout the nation. Twenty-eight million U.S. residents, older than age 5, speak Spanish, and only slightly more than half of those reported speaking fluent English. U.S. Census Bureau, *Facts for Features* (Sept 3, 2002), available at www.census.gov. Hispanic communities remain underserved by the legal system, due to the paucity of attorneys who are willing and able to provide representation. Individuals facing a language barrier are often unable adequately to participate in their own representation. Minorities are more likely to return to their communities and share their commitment to equal justice. This commitment is manifest in their choices of employment. Attorneys of color also serve as needed role models for the youth of their communities. Moreover, increased numbers of lawyers of color within the community reduce the perception of racial and ethnic bias. If admission to law schools for qualified minorities continues, the pool of lawyers of color will grow. This development will ameliorate racial and ethnic bias in our system of justice.

C. The Elimination of Race as a Factor in Law School Admissions Would Clearly Cause the Legal Profession to be Less Diverse.

Minority enrollment in law schools has dropped sharply in States banning affirmative action. In California, first-year minority enrollment at Berkeley (Boalt Hall) has dropped from 33.5% to 22%, and from 35.7% to 30.1% at UCLA. Similar reduction in minority enrollment

has occurred at the University of Texas Law School as a result of the Fifth Circuit's decision in *Texas v. Hopwood*, 236 F.3d 256 (5th Cir. 2000). In 1996, the last entering class before the *Hopwood* decision, there were 31 African-American and 42 Hispanic students, 14.6% of the first year class. However, in 1997 the combined representation of African-Americans and Hispanics dropped to 7.4%. *Miles to Go* at 2. The overall number of minority students enrolling in law school will continue to decline unless the *Bakke* holding remains intact. A reduction in the number of law students of color would inevitably erode the modest gains people of color have made in the legal profession during the 1980s and 1990s. Diversity in the legal profession as a compelling State interest should lead this Court to recognize that the consideration of race is a permissible factor in law school admission decisions. Although alternatives to affirmative action have been considered, the American Bar Association Section of Legal Education and Admissions to the Bar reports that consideration of race, among other factors, is still the most effective vehicle to the attainment of diversity in the profession, an objective of critical importance to the Bar. Memorandum D9899-21, September 28, 1998.

1. The number of qualified students of color admitted to at least one law school would decrease substantially under a color-blind admissions policy.

Professor Wightman constructed two statistical models to evaluate the impact of color-blind admission policies on the admission rate of minority applicants to law schools. *See* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1 (1997) (hereinafter *Wightman Study*). Wightman used undergraduate grade point averages (UGPA) and law school admissions test (LSAT) scores from 90,335 applicants to

173 ABA-accredited law schools for the 1990-91 application year. Fifty-seven percent of the entire group received an offer of admission from at least one law school. *Id.* at 4. The first model, employing linear regression, used the UGPA and LSAT scores to predict color-blind admission rates at each of the 173 schools. *Id.* at 4-10. The model evaluated the probability of admission for each applicant for each of the schools to which applications were submitted. *Id.* at 50.

Table 1: Predicted Results of the Combined UGPA/LSAT Linear Regression Model

UGPA/LSAT Linear Regression	Admitted	Admit Rate	Color-Blind Admissions	Color-Blind Admit Rate	Decrease under Color-Blind Admissions
Total	90,335	57%			
African-American	3,435	48.5	711	10.04%	79.3%
Hispanic	1,351	58.64	700	30.38	48.2
Mexican-American	629	56.72	260	23.44	58.7

Id. at 4, 15-16.

A color-blind admission system that relies primarily upon UGPA and LSAT scores drastically reduces the admission rates of people of color. Color-blind admissions reduce the number of African-Americans admitted to at least one of the law schools to which they applied by 79.3%; of Hispanics by 48.2%; and of Mexican-Americans by 58.7%. *Id.* at 15-16. (The other non-white categories are American Indian, Asian-American, and Puerto Rican.) Wightman's predictions are remarkably accurate given the real world outcomes at Boalt Hall (University of California, Berkeley) and the University of Texas Law School subsequent to those schools' change in admissions policy.

The Wightman Study clearly illustrates the impact of color-blind admissions decisions on people of color. Only

41% of the students of color who were offered admission to at least one law school during the 1990-91 application year would have been admitted without affirmative action, as illustrated by the UGPA/LSAT linear regression model. *Id.* at 50. In the 1990-91 application year, 173 ABA-accredited law schools admitted 8,353 students of color. *Id.* at 15. Under a color-blind system, the same schools would have admitted 3,419 students of color. *Id.* Excepting Asian-Americans from affirmative action, as many schools have, the predicted admissions fell to 32% of actual admissions. *Id.*

2. The elimination of race as a factor in law school admissions would cause an overall decrease in the number of law students of color and, subsequently, there would be substantially fewer minority lawyers.

Eliminating race as a factor in law school admissions would not shift students of color to less selective law schools. Rather, there would be substantially fewer minority lawyers entering the legal profession because the aggregate number of minority students would decline.

Wightman's second model evaluates whether the aggregate numbers of students of color would remain constant under a color-blind system, *i.e.*, whether less selective law schools would admit minority students denied admission by highly selective schools. This model, the Law School Grid Model, collapses the 1990-91 admissions data nationally. *Wightman Study* at 9. The model calculates the number of students in the 1990-91 application year that would not have been offered admission to any law school. *Id.* at 18. The data generated by the model suggest that if UGPA and LSAT scores are used as the principal factors in the admissions determination, a color-blind admissions system would systematically exclude students of color from any law school opportunities.

Table 2: The Law School Grid Model

Grid Model	Admitted	Admit Rate to at Least One School	Color-Blind Admis-sions	Color-Blind Admit Rate to at Least One School	Decrease under Color-Blind Admissions
Total	90,335	57%			
African-Ameri-can	3,435	48.5	1,631	23%	52.5%
Hispanic	1,351	58.64	974	42	27.9
Mexican-Ameri-can	629	56.72	439	39.6	30.2

Id. at 4, 21.

Wightman found students of color denied by more selective schools will not shift entirely to less selective schools. The model suggests that only 23% of African-American applicants would be admitted under a color-blind program to any of the 173 ABA-accredited law schools. The number of African-Americans admitted would decline by 52.5%; of Hispanics and Mexican-Americans by 27.9% and 30.2%, respectively. Wightman concludes that the net result is likely to be a substantial reduction in the number of students of color in legal education. *Id.* at 51-52.

The Wightman Study makes two assumptions that understate the impact of law school color-blind admissions. First, the Grid Model assumes minority students would be willing and able to attend the schools that are most likely to offer them admission. Secondly, the models use the number of applicants in the 1990-91 application year. In terms of real numbers of minority students entering law school, the models assume the number of minority applicants will remain constant. The numbers of admitted students predicted by the Grid Model is inflated because the applicant pool is not impacted by color-blind undergraduate admission policies.

The elimination of affirmative action programs employed by undergraduate institutions also dramatically

reduces the number of minority students at those institutions. The Bowen and Bok study found that the effect of strict color-blind admissions would be to reduce the rate of undergraduate admissions to five selective institutions for African-Americans from 42% of those applying to 13%. William G. Bowen and Derek Bok, *The Shape of the River: Long Term Consequences of Considering Race in College and University Admissions* (1998) at 32. Color-blind admission policies effectively reduce the overall number of candidates for law school: Fewer minority undergraduates result in fewer minorities applying to law school.

This Court should hold that the use of race as a factor in graduate school admissions survives equal protection scrutiny, as it did in *Bakke*. The use of race and ethnicity, as criteria among others considered in the Respondents' admissions process, is permissible because it promotes diversity in the legal profession and facilitates "equality as a fact and equality as a result" in our society.

CONCLUSION

The decision of the U.S. Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

GILBERT PAUL CARRASCO

WILLAMETTE UNIVERSITY
COLLEGE OF LAW
245 Winter Street SE
Salem, Oregon 97301
(503) 370-6432 – Telephone
Attorney for Amici Curiae Hispanic National Bar Association and Hispanic Association of Colleges and Universities

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